Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(A)-408–12 OF 2015
ZAWAWI SALLEH, ABDUL RAHMAN SEBLI AND PRASAD ABRAHAM JJCA
15 DECEMBER 2016

Administrative Law — Judicial review — Certiorari to quash decision of respondents — First and second respondent revoked road reserve and alienated land to fourth respondent — Road reserve essential to gain entry and exit from appellant's hotel carpark — Road reserve essential in respect of Bomba by-laws — Whether appellant had locus standi — Whether there was legitimate expectation on part of appellant — Whether court could intervene exercise of statutory duty by first and second respondents — Whether decisions of first and second respondents should be impugned

The appellant was the owner of Lot 2897 (where Hotel Sentral was situated) whereas the fourth respondent was the owner of the land formerly held under Lot 3270. The land in question presently was the road reserve situated between Lot 2897 and the former Lot 3270. The appellant contended that the road reserve was essential to gain entry into and exit from Hotel Sentral's carpark and also essential in respect of *Bomba* by-laws. The appellant claimed that when it purchased Lot 2897, the appellant was not given the approved building plans. What the appellant had were the approved *Bomba* plans in respect of Hotel Sentral which included a site plan/key plan, basement second floor plan, basement first floor plan and fourth ground floor plan. The appellant further submitted that the manner in which Hotel Sentral was constructed followed the approved *Bomba* plans. Given the decision of the first and second respondents to revoke the road reserve and thereafter alienating it to the fourth respondent ('the impugned decisions') had resulted in the road reserve now forming part of the new Lot 3270, the appellant had lost its access to the hotel basement carpark. The appellant filed a judicial review application against the decision of the first and second respondents and sought to quashed the impugned decisions by way of certiorari. The learned trial judge found in favour of the respondents and held that the appellant was not adversely affected by the impugned decisions as the reserve was open to all users of the same, not particularly the appellant and that the appellant had failed to cross the threshold of being clothed with locus. Aggrieved by the trial court's decision, the appellant filed the present appeal. In the present case, there were two decisions that were being impugned by the appellant. Firstly, the decision to cancel the road reserve ('the first decision') and secondly, to set aside the

alienation of land including the road reserve to the fourth respondent ('the second decision'). With regards to the first decision, the issues arose were whether the appellant could claim a substantive right on the basis of legitimate expectation and whether the decision to cancel the road reserve frustrated the expectations of the appellant and thus rendered the first decision invalid.

Held, allowing the appeal in part:

(1) The learned judged had fallen into error on the issue of locus ie the appellant being an aggrieved party. The *Bomba* plans were identical to the building plans approved by the relevant authority which took into consideration the road reserve. The court was of the view that the approved *Bomba* plans were accurate. The hotel had been issued with a certificate of fitness which presumed construction of the hotel in accordance with the approved building plans. The appellant had crossed the threshold of locus standi and therefore was entitled to seek judicial review as the appellant had been adversely affected by the impugned decisions of the first and second respondents (see paras 14–15 & 17).

(2) The doctrine of legitimate expectation is couched in equity and will be subject to the relevant equitable doctrines. In the present case, the evidence overridingly showed that the appellant had relied on the representation of the first and second respondents with regards to the road reserve which was to their detriment as the road reserve which provided the access to the hotel no longer existed. The applicant should have been notified before alienation of the road reserve by the first and second respondents but there was no evidence to that effect. It was the decision to allow the road reserve that led to the legitimate expectation by the appellant that there would be the access road to the hotel and the appellant planned accordingly. It is incumbent upon the court to protect the interest of individuals whose expectations have been created by the very conduct of these particular bodies or authorities. Accordingly, the first decision should be impugned (see paras 23–24).

(3) Whilst the courts were at liberty to support and enforce the doctrine of legitimate expectation in the course of dealings between the first and second respondent and the appellant, the act of alienation of the reserved road to the fourth respondent was an exercise of unfettered statutory power as provided for under the National Land Code. The court would not grant the orders sought pertaining to the revocation of the transfer of the road reserve to the fourth respondent as the act of alienating the said road reserve to the fourth respondent remained vested with the state authority and for so long as the relevant authority had acted within the bounds of statute, the court would not by way of judicial intervention intervene in the exercise of its statutory powers and duties (see paras 25 & 27).

[Bahasa Malaysia summary

Perayu adalah pemilik Lot 2897 (di mana terletaknya Hotel Sentral) manakala responden keempat adalah pemilik tanah yang sebelum ini dipegang di bawah Lot 3270. Tanah yang dipersoalkan adalah rizab jalan yang terletak antara Lot 2897 dan sebelum ini Lot 3270. Perayu berhujah bahawa rizab jalan itu adalah penting untuk masuk dan keluar dari tempat parkir dan juga penting berkaitan undang-undang kecil Bomba. Perayu mendakwa bahawa apabila dia membeli Lot 2897, perayu tidak memberikan pelan bangunan yang diluluskan. Perayu hanya menerima pelan Bomba yang diluluskan berkaitan Hotel Sentral yang termasuk pelan tapak/pelan utama, pelan tingkat kedua ruang bawah tanah, pelan tingkat pertama, ruang bawah tanah dan pelan tingkat bawah keempat. Perayu selanjutnya berhujah bahawa cara Hotel Sentral dibina adalah mematuhi pelan Bomba yang diluluskan. Berdasarkan keputusan responden-responden pertama dan kedua untuk membatalkan rizab jalan dan selepas itu memberi milik rizab jalan itu kepada responden keempat ('keputusan-keputusan yang dipersoalkan') telah mengakibatkan rizab jalan itu kini membentuk sebahagian daripada Lot 3270 yang baharu, perayu telah hilang aksesnya ke tempat parkir bawah tanah hotel itu. Perayu telah memfailkan permohonan semakan kehakiman terhadap keputusan responden-responden pertama dan kedua dan memohon untuk membatalkan keputusan-keputusan yang dipersoalkan itu melalui certiorari. Hakim perbicaraan yang bijaksana mendapat telah menyebelahi responden-responden dan memutuskan bahawa perayu tidak terjejas teruk akibat keputusan-keputsan yang dipersoalkan itu kerana rizab itu adalah terbuka kepada semua pengguna yang sama, tidak khusus kepada perayu dan bahawa perayu telah gagal untuk membuktikan ia mempunyai locus. Terkilan dengan keputusan mahkamah perbicaraan, perayu telah memfailkan rayuan ini. Dalam kes ini, terdapat dua keputusan yang dipersoalkan oleh perayu. Pertama, keputusan untuk membatalkan rizab jalan itu ('keputusan pertama') dan kedua, untuk mengetepikan pemberian milik tanah termasuk rizab jalan itu kepada responden keempat ('keputusan kedua'). Berhubung keputusan pertama, isu yang timbul adalah sama ada perayu boleh menuntut hak substantif berdasarkan jangkaan sah dan sama ada keputusan untuk membatalkan rizab jalan mengecewakan jangkaan perayu dan oleh itu menjadikan keputusan pertama tidak sah.

Diputuskan, membenarkan sebahagian daripada rayuan:

(1) Hakim yang bijaksana telah terkhilaf berhubung isu locus iaitu perayu sebagai pihak yang terkilan. Pelan Bomba itu adalah sama dengan pelan bangunan yang diluluskan oleh pihak berkuasa yang berkaitan dengan mengambil kira rizab jalan itu. Mahkamah berpendapat bahawa pelan Bomba yang diluluskan itu adalah tepat. Hotel tersebut telah dikeluarkan sijil kelayakan yang menganggap pembinaan hotel tersebut adalah menurut pelan bangunan yang diluluskan. Perayu telah

melangkau locus standi dan oleh itu berhak memohon semakan kehakiman kerana perayu telah terjejas dengan teruk akibat keputusan-keputusan responden-responden pertama dan kedua yang dipersoalkan itu (lihat perenggan 14–15 & 17).

(2) Doktrin jangkaan yang sah diungkapkan dalam ekuiti dan tertakluk kepada doktrin ekuiti yang berkaitan. Dalam kes ini, bukti keterlaluan menunjukkan bahawa perayu telah bergantung kepada representasi responden-responden pertama dan kedua berhubung rizab jalan itu yang menjejaskan mereka kerana rizab jalan yang memberikan akses ke hotel tersebut tidak wujud lagi. Pemohon sepatutnya diberitahu sebelum pemberian milik rizab jalan oleh responden-responden pertama dan kedua tetapi tidak ada keterangan mengenainya. Ia adalah keputusan untuk membenarkan rizab jalan itu yang membawa kepada jangkaan yang sah oleh perayu bahawa terdapat akses jalan ke hotel tersebut dan perayu telah merancang sewajarnya. Ia adalah wajib untuk mahkamah melindungi kepentingan individu yang mana jangkaannya dibentuk disebabkan tingkah laku badan atau pihak berkuasa tertentu ini. Sewajarnya, keputusan pertama patut dipersoalkan (lihat perenggan 23–24).

(3) Di mana mahkamah bebas untuk menyokong dan menguatkuasakan doktrin jangkaan yang sah sepanjang urusan antara responden-responden pertama dan kedua dan perayu, tindakan pemberian milik rizab jalan kepada responden keempat adalah pelaksanaan kuasa statutori yang tidak terkawal sepertimana diperuntukkan di bawah Kanun Tanah Negara. Mahkamah tidak memberikan perintah yang dipohon berkaitan dengan pembatalan pemindahan rizab jalan itu kepada remsponden keempat kerana tindakan memberi milik rizab jalan tersebut kepada responden keempat masih kekal dengan pihak berkuasa negeri dan selagi pihak berkuasa berkaitan telah berintak dalam ruang lingkup statut, mahkamah tidak akan melalui campur tangan kehakiman mengganggu pelaksanaan kuasa dan kewajipan statutori (lihat perenggan 25 & 27).]

Notes

For a case on certiori to quash decision of respondents, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 439.

Cases referred to

Council of Civil Service Unions and Others v Minister for the Civil Service [1985] AC 374, HL (refd)

Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123, FC (refd)

Law Pang Ching & Ors v Tawau Municipal Council [2009] 3 MLJ 452; [2010] 2 CLJ 821, CA (refd)
Motilal Padampat Sugar Mills v State Of Uttar Pradesh And Ors 1979 AIR 621, SC (refd)
North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] MLJU 1529; [2011] 4 CLJ 729, FC (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)
R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714, QBD (refd)
SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) [2010] 2 MLJ 377, HC (refd)
Union of India v Anglo Afghan Agencies 1968 AIR 718, SC (refd)

Legislation referred to

National Land Code s 76

Appeal from: Application For Judicial Review No 25–27–07 of 2014 (High Court, Johor Bahru)

Ranjit Singh (Yeoh Cho Kheong and Owee Chia Ming with him) (Owee & Ho) for the appellant.
Abdul Malik bin Ayob (Johor State Legal Advisor, State Advisor's Office) for the respondent.
Mohd Faizal bin Ahmad (Hazelin & Assoc) for the third respondent.
Chen Wai Jun (WJ Chen & Co) for the fourth respondent.

Prasad Abraham JCA:

INTRODUCTION

[1] We heard this appeal on 15 August 2016, when after hearing submissions of both parties, we reserved judgment to a date to be fixed. We now deliver our grounds of judgment.

BACKGROUND FACTS

[2] We will refer to the respective parties as cited in the original suit. The facts are elucidated from the pleadings, judgment of the learned judge and the submissions of respective parties.

[3] The applicant and MB Builders Sdn Bhd ('the fourth respondent') are private limited companies incorporated in Malaysia. At all material times, the applicant was the registered and beneficial owner of Lot 2897 where a 12th

A storey and second floor basement hotel known as Hotel Sentral is situated. The applicant bought Lot 2897 together with Hotel Sentral from Naza Hotel (M) Sdn Bhd.

B **[4]** Pursuant to a separate sale and purchase agreement dated 16 May 2011, the applicant purchased two adjacent vacant lands held under Geran 45289, Lot 10578 and Geran 42590, Lot 10579 both in Bandar Johor Bahru, Daerah Johor Bahru. The applicant is now the registered proprietor of Lots 10578 and 10579 (formerly known as one Lot 2898). At all material times, the fourth respondent was the registered owner of the land formerly held under Lot 3270.

C

[5] In a gist, the land in question presently which is the 'road reserve' is situated between Lot 2897 (where Hotel Sentral is situated) and the former Lot 3270 in the form of a strip of land marked in the site plan (exh A6 applicant's first affidavit) 'Jalan Lekas'.

D

[6] The road built on the 'road reserve' had been utilised by the public at large, including the applicant's Hotel Sentral. Hotel Sentral obtained its certificate of fitness on 20 June 2003.

E

[7] The applicant claimed that when it purchased Lot 2897, the applicant was not given the approved building plans. What the applicant had were the approved *Bomba* plans, specifically, the plans endorsed by Bahagian Pencegah dan Keselamatan, Jabatan Bomba dan Penyelamat Malaysia bearing the file F reference No JBPM/PK31080, in respect of Hotel Sentral which included a site plan/key plan, basement second floor plan, basement first floor plan, and fourth ground floor plan ('the approved *Bomba* plans').

[8] It was the applicant's contention that the manner in which Hotel G Sentral was constructed followed the approved *Bomba* plans. Given the decision to revoke the 'road reserve' and thereafter alienating it to the fourth respondent has resulted in the 'road reserve' now forming part of the new Lot 3270, the applicant had lost its access to the hotel basement car park.

H **[9]** By a letter dated 21 April 2014 from MB Era Build Sdn Bhd which was received by a related company of the applicant on 22 April 2014, the applicant was informed that MB Era intended to hoard the new Lot 3270, in their own words '... DI ATAS LOT 3270 DAN REZAB JALAN ...'. The hoarding was subsequently erected to allow the fourth respondent to commence I construction work on the new Lot 3270. This was evidenced by the heavy machineries that had been mobilised on site.

[10] The applicant contended that it only came to know of the developments concerning the 'road reserve' upon receipt of the said 21 April

2014 letter. The applicant's subsequent complaints to the first three respondents were not, according to the former, satisfactorily addressed.

[11] The applicant contended that the state authority made the decisions to purportedly revoke the 'road reserve' and to alienate the same to the fourth respondent to its detriment.

THE APPEAL

[12] The applicant contended that there was a 'road reserve' adjacent to Hotel Sentral which was essential to gain entry into, and exit from its basement carpark. That 'road reserve' was also essential in respect of *Bomba* by-laws. The applicant further contended that irrespective of whether the land concerned was a 'road reserve', the alienation to MB Builders was in perpetuity. The applicant also contended that it was incumbent upon the state authority to justify that there were special circumstances to do so by reason of s 76 of the National Land Code (Act 56) ('the NLC'). Further, the applicant went on to state that the state in alienating the land to MB Builders acted irrationally and unreasonably as now Hotel Sentral has no access to its basement parking and is in breach of various *Bomba* by-laws.

RELIEF SOUGHT

[13] The relief sought for by the applicant is pivoted on judicial review as a cursory reading of the reliefs sought in the High Court will show one of the points argued in the court below which to our mind has to be addressed first. The applicant would have to satisfy the court that they would be adversely affected by the impugned decisions of the first and second respondents. The learned judge in his grounds of judgment, found that the applicant was not 'adversely' affected by the impugned decisions as the reserve was open to all users of the same, not particularly the applicant and that the applicant had failed to cross the threshold of being clothed with locus.

[14] We agree with the submissions of counsel for the applicant that the learned judge had fallen into error on the issue of locus ie applicant being an aggrieved party. The *Bomba* plans were identical to the building plans approved by the relevant authority which took into consideration the road reserve. To our mind, the approved *Bomba* plans are accurate. The learned judge failed to take into consideration the preliminary report of Khoo Li Kee, architect (Tab 21 pp 60–71 CBD). We also take note of the fact that the approved lay out plan was approved before the alienation of road reserve to the fifth respondent was complete (Tab 23).

[15] Further, the six metre set back could not be used as access to the hotel. It is noted that the hotel had been issued with a certificate of fitness which presumes construction of the hotel in accordance with the approved building plans.

[16] We refer to the decision of this court in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532, a decision of the Court of Appeal, the test for threshold locus standi was set out and we quote:

> [16] It is to rid this dichotomous approach which often produced injustice that O 53 in its present form was introduced. *There is a single test of threshold locus standi for all the remedies that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'.* At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned. See, *Finlay v Canada* [1986] 33 DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae,* grant the applicant threshold standing. See, for example *Thorson v Attorney General of Canada* [1975] 1 SCR 138. (Emphasis added.)

And to the judgment of His Lordship Gopal Sri Ram JCA (as he then was) we quote at paras 17–18 of the judgment.

> [17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases which are in the nature of public interest litigation. *The test for determining whether an application is public interest litigation is that laid down by the Supreme Court of India in Malik Brothers v Narendra Dadhich AIR 1999 SC 3211, where, when granting leave, it was said:*
>
> > Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.
>
> [18] In an ordinary case, if on a reading of the application for leave to issue judicial review the court is satisfied that the applicant has neither a sufficient personal interest in the legality of the impugned action in the sense already discussed, nor is

the application a public interest litigation, then leave may safely be refused on the ground that the applicant is not a person 'adversely affected'. In this context, the court must bear in mind what Lord Diplock said in *Inland Revenue Commissioners v National Federation of Self-employed & Small Businesses Ltd* [1982] AC 617:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application. (Emphasis added.)

[17] We find that the applicant has crossed the threshold of locus standi and therefore is entitled to seek judicial review as the applicant has been adversely affected by the impugned decisions of the first and second respondents.

[18] The relief sought can be found in *RR Jld* 1 *Bahagian* A at p 66. There are two decisions that are being impugned by the applicant. The first of which is the decision to cancel the road reserve ('the first decision') and to set aside the alienation of land including the road reserve to the fourth respondent ('the second decision'). Both these decisions are sought to be quashed by way of certiorari. The rest of the prayers are consequential to the aforesaid.

THE FIRST DECISION

[19] We are of the view that for the applicant to successfully mount a challenge to the first decision, the applicant would have to invoke the doctrine of legitimate expectation. The question to be addressed is can the applicant claim a substantive right on the basis of legitimate expectation and whether the decision to cancel the road reserve frustrates the expectations of the applicant and thus renders the first decision invalid. In other words, have the first and second respondent acted fairly on the facts of this case which they are under a duty to do.

[20] The law in this area has developed in various jurisdictions and the position seems to be to recognise the concept. The position is that the policy maker is free to make decisions unfettered, subject of course to the legitimate expectations of people arising out of and relying to their detriment on the representations of the respective authorities and such an interest is worthy of protection. We refer to the decision of the High Court in United Kingdom in *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 where it was held:

(2) That the applicants would, apart from considerations of national security, have had a legitimate expectation that unions and employees would be consulted before the minister issued her instruction of 22 December 1983, and, accordingly, the decision-making process would have been unfair by reason of her failure to consult them and would have been amenable to judicial review.

[21] The Indian Supreme Court also have recognised the principle of legitimate expectation in India and we make reference firstly to the case of *Motilal Padampat Sugar Mills v State Of Uttar Pradesh And Ors* 1979 AIR 621, the Indian Supreme Court approaching it from a stand point of promissory estoppel and to the judgment of Bhagwati J at pp 643–644 and we quote:

> It was thus laid down that a party who has, acting in reliance on a promise made by the Government altered his position, is entitled to enforce the promise against the Government, even though the promise is not in the form of a formal contract as required by Article 299 and that Article does not militate against the applicability of the doctrine of promissory estoppel against the Government.
>
> 24. This Court finally, after referring to the decisions in the *Ganges Mfg Co v Surujmull* (1880) ILR 5 Cal 669, *Municipal Corporation of the City of Bombay v Secy of State for India* (1905) ILR 29 Bom 580 and *Collector of Bombay v Municipal Corporation of the City of Bombay* AIR 1951 SC 469, summed up the position as follows:
>
> > *Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen'. The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee, and in fact, the promissee acting in reliance on it, alters his position, the Govt would be held bound by the promise and the promise would be enforceable against the Govt, at the instance of the promise, notwithstanding that there is no consideration or the promise and the promise is not recorded in the form of a formal contract as required by Art 299 of the Constitution.* It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel? Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of 'honesty and good faith'? Why should the Government not be held to a high 'standard of rectangular rectitude while dealing with its citizens'? there was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations, but, let it be said to the eternal glory of this Court, this doctrine was emphatitically negatived

in the Indo-Afghan Agencies case (AIR 1968 SC 718) and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promise and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislatures must, therefore be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts which have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah J, pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise 'on some indefinite and undisclosed ground of necessity or expediency', nor can the Government claim to be the sole judge of its liability and repudiate it 'on an ex parte appraisement of the circumstances'. If the Government wants to resist the liability, it will have to disclose to the Court what are the subsequent events on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those events are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability, the Government would have to show what precisely is the changed policy and also its reason and justification so the court can judge for itself which was the public interest lies and what the equity of the case demands. It is only if the court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government

should not be held bound by their promise but should be free to act unfettered by it, that the court would refuse to enforce the promise against the Government. The court would not act on the mere ipse dixit of the Government, for it is the court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigourous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise 'on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position' provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise could become final and irrevocable. (Emphasis added.)

And also to the decision of the Supreme Court in *Union of India v Anglo Afghan Agencies* 1968 AIR 718 and we quote for the judgment of Shah J at p 728:

(23) Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen. We agree with the High Court that the impugned order passed by the Textile Commissioner and confirmed by the Central Government imposing cuts in the import entitlement by the respondents should be set aside and quashed and that the Textile Commissioner and the Joint Chief Controller of Imports and Exports be directed to issue to the respondents import certificates for the total amount equal to 100 per cent of the fob value of the goods exported by them unless there is some decision which falls within Clause 10 of the Scheme in question.

[22] This principle of legitimate expectation has been accepted in our law in the decision of the Court of Appeal in *Law Pang Ching & Ors v Tawau Municipal Council* [2009] 3 MLJ 452; [2010] 2 CLJ 821 but on the facts it was held it did not apply. His Lordship Gopal Sri Ram JCA (as he then was) at paras 25–26, 39, 46 and 52 of the judgment said and we quote:

[25] It was strongly argued by the appellants that the President of the respondent had sometime in 1998, at a function, announced that the stallholders including the appellants could carry on business at the market and this had created a legitimate expectation on the part of the appellants of procedural fairness in the decision making of the respondent in terminating the market.

[26] With respect, I am not persuaded with the said argument. The argument would have been valid, if, the land where the market stands belongs to the respondent. But this is not the case. The land does not belong to the respondent. The market stands on a privately owned land. The registered owner is ATS. It is for this reason that the cases of *JP Berthelsen v Director of Immigration* [1998] 1 MLJ

134, *Samsuri bin Hj Dullah v Sandakan Municipal Council* [1988] 1 CLJ 581, *President of Batu Pahat v Lo Hong Tan* [1983] 1 MLJ 299 and *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama sama Serbaguna Sungai Gelugor dengan Tanggongan* [1999] 3 MLJ 1 cited in support are of no assistance to the appellants.

[39] *Having heard the parties, I am of the view that there is only one ground that merits further consideration, that is, whether the appellants have a legitimate expectation that the approval to continue trading at the market would not be withdrawn without first giving them the opportunity to make representations. It is not in dispute that the respondent did not hear them in person. It is also not in dispute that the respondent did not give them any reply to their letters or pleas made on their behalf by the landowner as well as by the state assemblyman.*

[46] In *Mc Innes v Onslow Fane and Another* Megarry VC advanced at least three categories in which the court is entitled to intervene. First there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head include cases where an existing licence-holder applies for a renewal of his licence or a person already elected or appointed to some position seeks confirmation from some confirming authority.

[52] In my judgment, being in the position where they are in, the appellants do not have a legitimate expectation that the approval would not be withdrawn until they have made their representations, when in the first place they are not the license holders. They can only hope that the approval to the landowner would not be withdrawn from which they would have benefited. But they cannot claim to have a better interest or right than the landowner. It is obvious that they do not fall into any of the categories referred to in *Mc Innes v Onslow Fane and Another*. (Emphasis added.)

See also *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377.

[23] In our view, this doctrine of legitimate expectation is couched in equity and will be subject to the relevant equitable doctrines. In our present case, the evidence overridingly shows that the applicant had relied on the representation of the first and second respondents with regards to the road reserve which now turns out to their detriment as the road reserve which provides the access to the hotel no longer exists (see Traffic Impact Assessment for the Cadangan Membina 1 Blok Bangunan 55 Tingkat Di Atas Lot 10578 & 10579, Jalan Tenteram, Bukit Meldrum, Johor Bahru at pp 560–619 of *RR, Jld* V *Bahagian* C). At the very least, the applicant should have been notified before alienation of the road reserve by the first and second respondents and we find no evidence to that effect. In our present case, it was the decision to allow the

road reserve that led to the legitimate expectation by the applicant that there would be the access road to the hotel and the applicant planned accordingly. To take away the right of access vide the road reserve with a stroke of a pen without prior notice or the exploration of viable options of which the use of the set back is not, a breach of the legitimate expectation of the applicant with regards to the road reserve.

[24] Whilst we accept executive freedom to formulate policy and decisions, it is incumbent upon the court to protect the interest of individuals whose expectations have been created by the very conduct of these particular bodies or authorities. Legitimate expectation as a concept is now in effect a term of art capable of being enforced in law provided the expectation sought to be protected faces an onslaught by virtue of changes of policy and/or reversing decisions that had been acted upon by sections of the public. Whether or not this point has been reached, is to be determined by the court taking into account the rationality and the legality of a particular decision or its fairness, all of which the court is the sole arbitrator (see *R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714).

[25] For the above reasons, we agree that the first decision should be impugned.

[26] The second impugned decision is the actual alienation of the reserved land to the fourth respondent which is also being challenged by the applicant. Whilst the courts are at liberty to support and enforce the doctrine of legitimate expectation in the course of dealings between the first and second respondent and the applicant, the act of alienation of the reserved road to the fourth respondent is an exercise of unfettered statutory power as provided for under the NLC.

[27] The general rule appears to be the doctrine of estoppel and legitimate expectation is not ordinarily available against the government nor is the government bound by any representation which may have been made expressly or by conduct which if needed to be acted upon would invoke a breach of statute. That position in law has been affirmed in Federal Court decision of *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123 particularly in judgment of Abdoolcader FJ at pp 127 (E right hand)–128 and we quote:

> Adverting now to the primary issue in this matter, scilicet, the respondents' claim that they have acquired an equitable right or interest to remain on the respective lots allocated to them, the learned judge acceded to this contention by applying the doctrine of equitable estoppel propounded in *Ramsden v Dyson* (1866) LR 1HL 129 and a concatenation of congeneric cases, and went on to hold that on the facts

the respondents were at all times licensees coupled with an equity. It would appear that misguided enthusiasm in claiming and resisting the application of the doctrine of equitable estoppel only generated a dispute on the facts of the matter and blinded all concerned to the necessity of considering its application in the circumstances of this case as a matter of law. No consideration appears to have been given on all sides to the concept of equitable estoppel in the sphere of public law where a statutory or public authority is involved as in the case before us, and when we raised this question counsel for the respondents merely repeated the submissions he made before the learned judge and which, we sense, were put forward with rather more hope than confidence.

We have earlier referred to the factual dispute between the parties on this aspect, with the respondents con-tending that they were permitted to stay there on a permanent basis with a promise of title to the land they occupied and the Director of Lands and Mines denying any such arrangement. We indicated to counsel on both sides that although this aspect and the finding of the learned judge in favour of the respondents' contention on the evidence adduced form part of the grounds of appeal, we were prepared to assume in favour of the respondents' factual contention in considering the question of law as to the applicability of the doctrine of equitable estoppel in the circumstances, and invited arguments on this basis.

It is necessary in the first instance to consider the authority of the collector to bind the state authority in making the commitment alleged by the respondents. He had no authority in our view to purport to commit the state authority even if he did give the assurances alleged (*Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313) 314. The State Authority may under the provisions of s 13 delegate the exercise or performance of any of its powers or duties to the Collector, and on the evidence of the Acting Director of Lands and Mines the Collector has by NSPU No 19 of 1969 with the concurrence of the District Land Committee only been delegated with authority to approve the conversion of land not exceeding three acres in area for agricultural purposes, and he has no power to alienate land regardless of acreage for housing. Section 48 prescribes that no title to state land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever, and s 78(3) provides that the alienation of state land shall take effect upon the registration of a register document of title thereto pursuant to the provisions referred to in subsection (1) or (2), and notwithstanding that its alienation has been approved by the State Authority, the land shall remain state land until that time. These statutory provisions by themselves would appear to provide a complete answer to and inhibit the interpolation of any equity in regard to the respondents' claim. There can be no intervention by equity in the face of the specific legislative provisions of the Code (*Pemungut Hasil Tanah, Kota Tinggi v United Malayan Banking Corporation Berhad* [1981] 2 MLJ 264).

On the matter of the concept of equitable estoppel in public law, we would refer to the decision of the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 in which Lord Fraser of Tullybelton deprecated (at p 606) the introduction of 'an estoppel or bar, personal to the particular party, which is quite inappropriate in this field of law, which is concerned with rights that run with land', and he went on to add that 'to do so would lead to uncertainty and confusion'. Lord Scarman in the course of his speech said (at p 616): 'In the field of

property law, equity is a potent protection of private rights, operating upon the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, which binds everyone', and he continued (at p 617): 'My Lords, I agree with the view so consistently expressed by Lord Parker, CJ, that it is wrong to introduce into public administrative law concepts such as equitable estoppel which are essentially aids to the doing of justice in private law'. This case was followed and applied by the English Court of Appeal in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment & Ors The Times*, 20 June 1983.

In *Cudgen Rutile (No2) Pty Ltd v Chalk* [1975] AC 520 the Judicial Committee of the Privy Council held that if certain authorities to prospect issued under the Mining Acts of Queensland contained an agreement by the Minister to grant mineral leases, that agreement was not authorised by the statutes which required a series of steps to be taken, decisions to be made and discretion to be exercised, before the Minister was empow-ered to grant a lease. Fundamental to the decision was the proposition that the Crown cannot contract for the disposal of Crown lands without statutory authority and that the agreement in question was not authorised because it was an anticipatory fetter on the exercise of a discretion which, according to the statute, had to be exercised in the public interest at the end of the prescribed procedure. To the same effect was Watson's Bay and *South Shore Ferry Co Ltd v Whitfeld* (1919) 27 CLR 268 which was referred to with approval and applied in *Cudgen Rutile*. We would refer again in this context to Sidek bin Haji Muhamad (supra at p 314).

We also refer to the Federal Court decision of *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] MLJU 1529; [2011] 4 CLJ 729 at p 733 wherein the Federal Court held and we quote:

(1) The power to refuse the payment submitted by the appellant was impliedly stated under s 78(3) of the NLC. That section clearly provided that so long as the land was not registered in the appellant's name, it was still owned by the State Government. This accordingly implicitly meant that the State Government had the power to revoke the previous approval and reject the payment made by the appellant. There was no express provision in the NLC which stated that the State Government must accept the payment made by way of Form 5A. Thus, the first respondent's act of rejecting and returning the payment made by the appellant was valid and proper following the provision of s 78(3) of the NLC.

[28] In the light of these authorities, we are of the view that the court will not grant the orders sought pertaining to the revocation of the transfer of the road reserve to the fourth respondent as the act of alienating the said road reserve to the fourth respondent remains vested with the state authority and for so long as the relevant authority had acted within the bounds of statute, the court would not by way of judicial intervention intervene in the exercise of its statutory powers and duties.

[29] Having given the matter due consideration and having taken into account the respective submissions of parties, we would allow this appeal in part as follows:

(a) the order of the High Court is varied;

(b) order in terms of prayers 1.1, 1.3 and 1.6 of the applicant's application for judicial review only;

(c) save as aforesaid, the rest of the order of the High Court remains in place;

(d) damages to be assessed by deputy registrar/senior assistant registrar;

(e) each party to bear its own costs;

(f) parties are at liberty to make applications to the High Court; and

(g) deposit of this appeal to be refunded to the appellant.

Appeal allowed in part.

Reported by Dzulqarnain Ab Fatar